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SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 375

SAFEWAY TRAILS, INC., *Appellant*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND THE BALTIMORE AND ANNAPOLIS RAILROAD COMPANY, *Appellees*.

On Appeal From the United States District Court for the District of Columbia

BRIEF OF APPELLANT IN OPPOSITION TO MOTIONS TO AFFIRM

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FOREWORD

Appellant (Safeway Trails) presents this brief in opposition to the motion of The Baltimore and Annapolis Railroad Company (Railroad), received October 3, 1959, and to the similar motion of the United

States of America and of the Interstate Commerce Commission (herein collectively called the Commission), received October 9, 1959, which seek to affirm the judgment of the specially constituted three-judge United States District Court for the District of Columbia, entered June 30, 1959 from which this direct appeal is taken.

The Statement as to Jurisdiction filed herein sets forth the basis of this Court's jurisdiction to entertain this direct appeal, the statement of the case and a statement of the questions presented and their substantiality. In addition, it contains the opinion of the District Court,[1] the opinion of division 1 of the Commission, the opinion of the Commission upon reconsideration and the recommended report of Joint Board No. 120, as Appendices A, B, C and D thereto respectively.

Safeway Trails asserts that the questions presented by this appeal are substantial and merit consideration by this Court upon full brief and argument after which the judgment of the District Court should be reversed and the injunction heretofore issued made permanent.

SUMMARY OF ARGUMENT

1. The Commisison possesses ample jurisdiction to compel the institution of a through route by a recalcitrant passenger motor carrier as a condition to the grant to that carrier of a certificate of public convenience and necessity. The failure of the Commission so to condition the certificate granted to the Railroad in

[1] The opinion of the District Court also may be found in the advance sheets at 176 F. Supp. 201 (1959); *Safeway Trails, Inc.* v. *Interstate Commerce Commission, et al.*

the instant case was based upon the erroneous belief of the Commission that it lacked jurisdiction to impose such a condition notwithstanding its contrary belief as to rail carriers under almost an identical statute. The motions to affirm filed herein fail to meet this contention, the resolution of which is of substantial importance to appellant, to the interstate passenger motor carrier industry generally and to the traveling public.

2. Although the Commission consistently has held itself to be without jurisdiction to limit the termination points of special and charter transportation performed by duly certificated regular route motor carriers, it has, nevertheless, recognized its authority to limit the point of origin of such charter and special transportation. Its disclaimer of jurisdiction to limit the Railroad from originating charter or special transportation at Washington, D. C. was contrary to law and to the facts and circumstances of this case.

The Commission, likewise, erred as a matter of law in failing to consider and by rejecting the unrefuted evidence of record as to the crippling and destructive effect upon the operations and services of existing Washington, D. C. carriers brought about by the Railroad's unwaranted intrusion into the charter and special transportation field originating within Washington, D. C.

The numerous petitions of the Commission and others to the Congress in this regard evidence the importance and substantiality of these issues which fully are resolvable by this Court.

3. Despite the several misleading and incorrect statements contained in the motions to affirm, the fact remains that the Commission failed to make an essential

finding of fact as to the need for service to Fort Meade; if such a finding had been made it would have been without the support of substantial evidence of record. The jurisdictional finding of the inadequacy of existing service to the District Training School was made by the Commission on Petition for Reconsideration without taking into consideration the contradicting evidence offered by appellant Safeway Trails. In resolving these contentions the District Court failed to apply the substantial evidence rule laid down by this Court in *Universal Camera Corp.* v. *National Labor Relations Bd.*, 340 U.S. 474 (1951) and misapplied the requirements of Section 8(b) of the Administrative Procedure Act, 60 Stat. 242 (1946), 5 U.S.C. § 1007(b).

ARGUMENT

1. THE QUESTION ON THROUGH-ROUTES

The Commission by its motion to affirm again seeks to obfuscate the issues raised by Safeway Trails, a tactic which paid dividends in the court below. Safeway Trails consistently has argued that the Interstate Commerce Act delegated to the Commission ample jurisdiction over the interstate passenger motor carrier industry to compel the institution of a through route by a recalcitrant carrier as an alternative or condition to the granting of the application of that carrier of a certificate of convenience and necessity under Section 207(a) of the Act.[2] Counsel for the Commission, on the other hand, consistently argued to the District Court below that the Commission was without such authority. Unfortunately, the opinion of the District Court fails utterly to solve this dispute; that court

[2] Section 207(a), Part II of the Interstate Commerce Act, 49 Stat. 551 (1935); 49 U.S.C. § 307(a).

apparently being content to digress on procedural grounds by pointing to Section 216(c) of the Act as being the "... appropriate and usual procedure to bring about the establishment of such a through route ..." (J.S. 4a) and the filing of a complaint thereunder.[3]

Such a disposition, however, ignores the substance of this very real problem which with greater frequency is commanding the attention of the industry, if not the Commission. Within the concept of *public convenience and necessity* is found authority sufficient to permit

[3] The immediate answer to this contention is that the requirements of a written complaint were satisfied by inclusion in the written record before the Joint Board of the oral "complaints" made by counsel and witnesses for Safeway Trails in addition to a letter received into evidence as Exhibit No. 19. See for example, *Forrestal* v. *Abilene & S. R. Co.*, 263 I.C.C. 457, 460 (1945), wherein the Commission, interpreting its own rules on this subject, held:

> "The first three of these rules might seem to imply that all amendments must be documentary in the usual sense. However, a stenographer's written minutes of a hearing, recording any oral amendments, meet the practical necessities of the situation. *The defendants are looking to form rather than substance: The oral amendment fully advised them of the issues they had to meet.* The most for which they could reasonably have asked was time to prepare and present evidence respecting the particular shipments included by the amendments. They made no request in that respect." (Italics supplied)

The Railroad did not ask for additional time to answer the through route demand of Safeway Trails. Indeed, none probably was warranted inasmuch as the Railroad already had received more than 3 weeks prior written notice by letter of the demand of Safeway Trails. See § 1.35(c) of the *General Rules of Practice before the Commission*, effective October 1, 1956, which provides for 20 days within which to answer a complaint.

the *affirmative* consideration by the Commission[4] of a through route demand when raised in a proceeding initially instituted under Section 207(a) of the Act; certainly, not only has this Court, but the Commission as well, consistently applied to this standard its intended liberal construction.[5]

While the District Court very well may be correct in stating (J.S. 4a) that "(t)he Commission has never required the institution of through routes" in a Section 207(a) proceeding or in the absence of a formal complaint filed under Section 216(c) of the Act, nevertheless, it is equally correct that the Commission never has required the establishment of a through route in a

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[4] The arguments advanced in the motions to affirm avoid the issue and address themselves only to negative consideration by the Commission.

[5] In one of its earliest decisions under Section 207(a) of the Act, the I.C.C. is found giving the following construction:

> "Perhaps the best interpretation of the purpose underlying the *public convenience and necessity* provisions was by the Supreme Court in *Texas & N. O. R. Co.* v. *Northside Belt Ry. Co.*, 276 U.S. 475, 479, as follows:
>
> > "The purpose of paragraphs 18 to 22 is to prevent interstate carriers from weakening themselves by constructing or operating superfluous lines, and to protect them from being weakened by another carrier's operating in interstate commerce a competing line not required in the public interest.'
> >
> > "The question, in substance, is whether the new operation or service will serve a useful public purpose, responsive to a public demand or need; whether this purpose can and will be served as well by existing lines or carriers; and whether it can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest." *Pan-American Bus Lines Operation*, 1 M.C.C. 190, 203 (1936).

complaint proceeding instituted under Section 216(c).[6]

However, in a convenience and necessity proceeding instituted under § 1(18) of Part I of the Act,[7] by a railroad seeking to extend its line, the Commission, when confronted with a through route demand by a competing railroad, found itself with ample jurisdiction over the subject, notwithstanding the failure of the competing railroad to follow the complaint procedure established by § 15(3) of the Act.[8] And the relevant language of § 15(3) is identical to that of the complaint procedure of § 216(c):[10] There, in a convenience and

[6] The Commission consistently has found itself without jurisdiction to compel motor carriers of property to institute through routes because of the permissive character of the language of § 216(c) of the Act: "Common carriers of *property* by motor vehicle *may* establish reasonable through route . . ." (italics supplied) 49 Stat. 558 (1935), 49 USC § 316(c). *Royons Between Trunk Line and New England Territories*, 44 M.C.C. 280 (1944); *Restrictions, Riss & Co., and Eliminations, Hi-Way Motor*, 46 M.C.C. 290 (1946). As to motor carriers of passengers, however, the language of § 216(a) is mandatory: "*It shall be the duty* of every common carrier of *passengers* by motor vehicle to establish reasonable through routes with other such common carriers . . ." (italics supplied) 49 Stat. 558 (1935), 49 USC § 316(a).

[7] 41 Stat. 476 (1920), 49 USC § 1(18).

[8] *Northern Pac. Ry. Co. Operation*, 261 I.C.C. 631, 642 (1946): "It is conceded by the Navy Department that the question whether a certificate should be issued upon condition that joint rates and through routes with other carriers be established *is one within the jurisdiction of this Commission* . . ." (italics supplied)

[9] 54 Stat. 911 (1940), 49 U.S.C. § 15(3).

[10] Cf. *§ 15(3)* "The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint establish through routes . . ."

§ 216(c) ". . . the Commission shall whenever deemed by it to be necessary or desirable in the public interest, after hearing, upon complaint or upon its own initiative without a complaint, establish through routes . . ."

necessity proceeding under § 1(18) of the Act, the Commission found its through route authority by virtue of its power to attach conditions to a certificate of public convenience and necessity as permitted by § 1(20) of the Act.[11] The Commission possesses the same power to condition a § 207(a) certificate by virtue of § 208(a) of the Act.[12]

Counsel for the Commission on page 4 of its motion to affirm, thus, are incorrect in stating that § 216(c) affords the only avenue available for the creation by the Commission of a through route between carriers. And contrary to the assertion of counsel for the Commission (page 5), Safeway Trails does not necessarily argue in favor of *detailed findings* by the Commission on the through route request; rather does Safeway Trails argue that a finding must be made at least in the language of § 216(a) as to the *reasonableness* of the through route demand. Even the District Court concluded this point when it stated:

> "But such a duty [to establish a through route under § 216(a)] is not absolute, see *Crown Coach Co. v. United States*, 44 F. Supp. 547, 550 (W.D. Mo. 1942), and is subject at least to a determination of what is reasonable under the circumstances.

[11] § 1(20) "The Commission . . . may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require . . ." 41 Stat. 478 (1920), 49 U.S.C. § 1(20).

[12] § 208(a) ". . . and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, *including terms, conditions and limitations as to the extension of the route or routes of the carrier* . . ." (italics supplied) 49 Stat. 552 (1935), 49 U.S.C. § 308(a).

see *Wolzinger* v. *Burlington Transportation Co.*, 43 M.C.C. 51, 53 (1943)." (J.S. 4a)

No such finding as to *reasonableness* was made by the Commission in the instant case; and it cannot be argued fairly that the Commission, in light of its own written opinion, did anything other than acknowledge the existence of the through route demand of Safeway Trails; certainly it failed to consider the reasonableness of the through route.

The Railroad in its motion to affirm (page 7), likewise, concedes that at least a determination of what is reasonable under the circumstances was appropriate in the instant case.[13] Had the Commission recognized its obligation under the Act and considered the facts and circumstances of the through route demand,[14] it would have concluded upon the *reasonableness* of the proposed through route and, thereafter, granted *only in part*[15] the application of the Railroad for a certificate of public convenience and necessity upon the express

[13] On page 5 of its Motion the Railroad also argues that "(t)he provisions of Section 213(a) are not mandatory." It is difficult to conceive more commanding language than: "*It shall be the duty . . .*"

[14] The unrefuted testimony before the Commission was that the through route demand, from an operational point of view, was at least equal to the service proposed by the Railroad for its exclusive operation which would have deposited passengers on city streets instead of at the centrally located Trailways Terminal utilized by Safeway Trails. Need for shelter was expressed by all of the public witnesses offered by the Railroad.

[15] The Railroad sought three routings from the Commission, one of which was for authority between Fort Meade and Washington, another of which was denied (J.S. 9a), and a third of which was for an improved route from Glen Burnie to Fort Meade which was unopposed. The Commission granted the first and third of these requests. (J.S. 8a).

condition that the Railroad enter into a through route as demanded and proposed by Safeway Trails.[16]

The motions to affirm filed herein do not question the substantiality of the issues presented by the appeal; rather do these motions address themselves to the correctness of some of the solutions advanced by Safeways Trails to these issues. The importance to the commerce of our nation of the establishment of through routes between carriers was recognized fifty years ago in a situation, although dissimilar to that now presented, this Court, in reflecting upon the establishment of through routes, observed:

> "Nothing has perhaps contributed more to the wealth and prosperity of the country than the almost universal practice of transportation companies to co-operate in making through routes and joint rates. Through this method, a situation has been brought about by which, though independently managed, connecting carriers become in effect one system. This practice has its origin in

[16] On page 4 of its motion to affirm, the Railroad states that the through route demand of Safeway Trails contemplated ". . . using equipment of the appellee between Glen Burnie and Fort Meade and that of the appellant between Fort Meade and Washington." This is untrue. What Safeway Trails did propose was a through operation without change of bus en route; that either all Railroad equipment, or Safeway equipment or a combination of equipment could be utilized depending upon the preference of the Railroad. The fact is, that as far as the public were concerned, the operation as proposed by Safeway would have been at least as satisfactory as that proposed by the Railroad; probably it would have been better because of the superior equipment, manpower and terminal facilities of Safeway Trails; most assuredly it would have been vastly superior financially to both carriers, than the economically unsound operation proposed by the Railroad. The Commission, however, ignored these factors upon the belief that it lacked the power to compel the institution of a through route except in a § 216(e) complaint proceeding.

the mutual interest of such companies and in the necessities of an expanding commerce." *Atlantic C. L. R. Co.* v. *Riverside Mills*, 219 U.S. 186, 198 (1910)[17]

Safeway Trails is a member of the National Trailways Bus System, an unincorporated association of independent bus companies offering to the public nationwide bus service by virtue of the through routing of buses. This Court may be assured that many of these through routes were not created altogether willingly but arose through the recognition by these companies[18] of the mandatory provisions of § 216(a), the very provisions which the opinion of the District Court dilutes and which appellees would destroy. Failure of this Court to note probable jurisdiction herein probably will not result in the collapse of the Trailways association, but it certainly will diminish the negotiating power of many of its member companies. And the very evils which Part II of the Act sought to destroy will be revived to the public detriment.

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[17] The existence of through routes among carriers is not bottomed upon a common law right of one carrier to compel another to join in the creation of a through route for at common law only through voluntary cooperation could a through route come into existence. *Atchison, T. & S. F. R. R. Co.* v. *Denver & N. O. R. R. Co.*, 110 U.S. 667 (1883). §§ 1(4), 216(a) and 305(b) of the Act made mandatory the creation of reasonable through routes by railroads, motor carriers of passengers and water carriers, respectively.

[18] Many of these companies actively compete among themselves as well as with other independents and the giant Greyhound Corporation. Inroads into the motor carrier industry by the railroads with their crushing financial resources, including Commission supported financing, are a matter of great concern to these independents.

2. THE QUESTION ON SPECIAL AND CHARTER BUS SERVICE

Counsel for the Commission, on pages 5 and 6 of its motion to affirm, argue that the Commission is without authority to condition or limit the transportation of special or charter parties authorized by § 208(c) of the Act[19] to regular route carriers duly certificated under § 207(a) of the Act.[20] In support of this position the Commission cites *Peninsula Transit Corp. Common Carrier Application*, 1 M.C.C. 440; *Regulations Governing Special or Charter Party Service*, 29 M.C.C. 25; and *The Baltimore and A. R. Co., Extension-Fort George G. Meade*, 63 M.C.C. 357.[21]

Citing the first of these three cases, the District Court rejected the arguments of Safeway Trails and concluded that despite the authority granted by § 208(a) to condition or limit a certificate of public convenience and necessity, "... the fact remains that as early as 1937, Section 208(c) was interpreted to be a mandatory provision granting the Commission no authority to place any limitation in a certificate which would restrict charter privileges." (J.S. 5a, 6a). It is incredible that the District Court could have read and under-

[19] 49 Stat. 552 (1935), 49 U.S.C. § 308(c).

[20] This same argument is advanced by the Railroad on pages 7, 8 and 9 of its motion to affirm.

[21] It is curious to note that in *Baltimore and A. R. Co., Extension—Fort George G. Meade*, 63 M.C.C. 357 (1954) this same Railroad was found arguing of the existence of a great demand for direct service between Baltimore and Fort Meade and of its strong desire to provide through route service with other carriers (359). Despite the opposition of Safeway Trails and numerous other carriers, the Commission granted the Railroad the sought after certificate. To date, the Railroad has yet to operate a single direct bus between Baltimore and Fort Meade, and it has steadfastly refused to operate in through route service with any other carrier.

stood the holding of the Commission, in the Peninsula case, *supra*, for there the holding of the Commission rather than supporting the District Court and the argument of appellees, on the contrary, is strong authority in support of the contention of Safeway Trails.

The Peninsula case, *supra*, held:

> "We have no authority to place any limitation upon the destination points or territory which a regular route common carrier of passengers may serve in special or chartered party operations. *We may, however, by special or general rules and regulations, impose appropriate limitations as to origin territory, and prescribe terms and conditions applicable to such operations which are consistent with the provisions and policy of the Motor Carrier Act.*" *Peninsula Transit Corp. Common Carrier Application*, supra, 1 M.C.C. at p. 442[22] (italics supplied)

This interpretation is entirely consistent with the language of the Act itself which provides for service "*to* any point within the United States" but which makes no mention as to the points of origin.

Safeway Trails and the numerous other protesting carriers before the Commission[23] never argued that the

[22] The Commission there went on to impose a restriction on the certificate issued to the carrier limiting the points at which Peninsula may originate special or charter parties under § 208(c) of the Act, and concluded: "This finding is to be deemed a special rule prescribed for the purpose of this proceeding . . ." 1 M.C.C. at p. 443. The holding of the Peninsula case, *supra*, was followed in the other two cited cases as well as in other Commission decisions too numerous to list. See *Interstate Commerce Act Annotated* Vols. 10-17, § 208(c).

[23] There was never any doubt in the minds of the practitioners in the proceeding before the Commission that the application of the

certificate should be restricted against all charter rights; what was needed and wanted was a restriction or "special rule" preventing the Railroad from originating special or charter parties at Washington, D. C.,[2] a power which the Commission for many years consistently has recognized. In the instant case, however, the Commission ignored this power and dismissed the arguments and evidence relating to the detrimental effect to be visited upon existing Washington based carriers by further inroads upon their charter and special operations, by stating that the existence of such inroads and the evidence thereon is "immaterial." (J.S. 20a). The Railroad offered no evidence in opposition.

The evidence which the Commission rejected as immaterial discloses that Safeway Trails, in common with numerous other Washington based carriers, and indeed with carriers all over our nation, in the public interest operates a number of regular routes at a deficit and that it is able to do so only by virtue of its revenues derived from special and charter runs. Further inroads upon these essential revenues are shown by the record herein to be destructive of some of those needed services now offered by existing carriers. Safeway Trails itself operates over several routes which do not produce revenues sufficient to defray their costs of operation. However, because of apparent public need, Safeway Trails continues their operation with revenues derived from special and charter services, most of which originate at Washington, D. C.; and it was only

Railroad merely was a subterfuge to obtain Washington based charter rights. Although the Railroad never denied this contention the Commission found it to be immaterial (J.S. 13a, 20a, 22a)

[2] J.S. 8a, 12a, 16a.

as to those charter and special services originating in Washington that Safeway Trails sought restriction. Any thoroughly experienced practitioner before the Commission readily should concede that the Commission since before the Peninsula case cited above, always has deemed itself empowered to limit points of origin of special and charter service, although it never has recognized a similar power over their destination.

It is this interpretation which the Commission for almost 25 years consistently has followed and not that interpretation suggested by the District Court and appellees herein who for the purpose of this case refuse to recognize a distinction between restrictions as to origin and restrictions as to destination.[25] This is but another instance in which the opinion of the District Court fails to confront the issues raised by Safeway Trails which should be resolved on this appeal.

The substantiality of this issue is evidenced by the numerous petitions by the Commission and others to the Congress as cited by the District Court (J.S. 6a), the Railroad's motion to affirm (p. 8), as well as by the motion of the Commission (p. 6).

[25] The only reason certificated carriers now may originate charter or special service at any terminal point along their line is because of Rule III 8f the Commission's General Rules and Regulations Governing Special or Chartered Party Service, established in *Regulations Governing Special or Charter Party Service*, supra; the Commission reserves the right in any given case to enter a *special* rule contrary to these *general* rules.

3. THE FINDINGS AND THE EVIDENCE

a. Fort George G. Meade

On page 3 of its motion to affirm, counsel for the Railroad states that the Commission restricted the Railroad from serving the National Security Agency. This is an incorrect statement; the Commission imposed no such restriction upon the Railroad. Instead the Commission found: "No evidence was presented by applicant with respect to the proposed service to the National Security Agency, therefore, that part of the application should be denied." (J.S. 32a).[26] But this was not the only point concerning which the Railroad offered no evidence, for it offered none with respect to service to Fort Meade, and that part of the application also should have been denied.

On pages 10 and 11 of its motion, the Railroad reviews the witnesses presented by it and the service area covered by their testimony. Despite this exaggerated review, the Railroad still fails to point to a single witness or to the slightest fragment of evidence of need for additional Fort Meade service. The best the Railroad has to offer in its motion by way of evidence of record indicating public need for additional Fort Meade service, is the argument that the District Training School is located within Fort Meade, and since there is evidence of record supporting its contention as to the District Training School, that this is sufficient to include Fort Meade, and that in any event the Com-

[26] This conclusion is found in the report of the Joint Board and was not excepted to by the Railroad (J.S. 9a). Inasmuch as the National Security Agency (NSA) is located within the Fort Meade military reservation, the Railroad still could serve it under the unrestricted grant to serve Fort Meade; upon the representations of the Railroad, however, the District Court held otherwise, and Safeway Trails is content to rest upon this holding.

mission was not required to make a finding as to every stop along the Railroad's proposed route.

The argument is totally facitious and untrue. The District Training School is not located on the Fort Meade reservation but rather is located off of U. S. Route 602 before the entrance of Fort Meade is even reached; its geographic area extends from one quarter of a mile to a mile away from the highway and from Fort Meade. The fact is that the Railroad solicited testimony from the experienced transportation officer of Fort Meade, Colonel Mason, who refused to support the Railroad's case for the simple reason that the Railroad wanted him to testify as to need for additional Fort Meade service and he knew there was no such need.

To argue that the Commission was not required to make a finding as to the need for additional Fort Meade service[27] is to ignore the fact that Fort Meade is the terminal point on Safeway's line and the most important stop on its run; that although Safeway's service is operated at a loss, what revenues it does obtain from this run come mostly from Fort Meade.

Throughout the proceedings before the Commission and then before the District Court, Safeway Trails consistently has argued that service by a new carrier was not needed at Fort Meade. The statement of counsel for the Commission in footnote 4 (page 7) of its motion to affirm that this contention was not raised before is utterly untrue. Counsel goes even further in this same footnote and claims that the Commission did discuss the inadequacy of service to Fort Meade and points to the reports of division 1 and of the Joint

[27] Railroad's motion page 11.

Board, citing J. S. 8a, 9a, 10a-11a, 12a-13a, 29a-30a, 32a-33a. But these pages say no such thing, and it is untrue and, thus, improper to claim otherwise. It would appear that in citing these pages and making the argument thereon, someone thumbed through the appendices of Safeway Trail's Jurisdictional Statement and copied down a page number every time the name Fort Meade appeared; the references reflect cavalier disregard for the truth and a callus ignorance of the content of the record.[28]

b. The District Training School

Fort Meade was one of the proposed service points of which Safeway Trails complained. The other service point complained of was the District Training School. The record demonstrates that Safeway Trails, ever since the school opened a few years ago, has sought without success cooperation from the school authorities to ascertain the transportation needs of the school. Not until the first hearing before the Commission in the instant case were these needs crystalized, whereupon Safeway Trails promptly enlarged its service specifically to meet the alleged needs. As found by the Joint Board, witnesses employed by the school testified of a need for transportation to and from Washing-

[28] J.S. 32a-33a cited in the Commission's Motion to Affirm states "Applicant (Railroad) holds authority to operate between Glen Burnie and Fort George G. Meade and what it is here seeking is authority to operate between Washington and Fort George G. Meade including intermediate points between the latter points and Laurel to render a through service between Washington and Glen Burnie." The Railroad at no time made any effort to offer proof as to Fort Meade service, because Fort Meade was merely an unimportant point along its proposed line at which it could not hope to stimulate new business not presently being carried by Safeway Trails.

ton and the Training School to meet the school work shifts of 6:30 a.m. to 3:00 p.m., from 10:45 p.m. to 6:45 a.m., and from 2:30 p.m. to 11:00 p.m. (J.S. 27a). Bus service for Sunday visiting hours of 1:00 to 4:00 p.m. also was said to be needed (J.S. 28a). Safeway Trails promptly enlarged its service by adding schedules "... leaving Washington at 5:30 a.m., 1:35 p.m. and 9:50 p.m., daily and 1:45 p.m. on Sunday and returning to Washington ... at 7:15 a.m., 3:20 p.m., and 11:30 p.m., daily and 4:15 p.m., on Sunday." (J.S. 30a) These schedules depart Washington from the centrally located Trailways Terminal[29] and proceed out New York Avenue, Northwest to the school picking up passengers along the way and return over the same route. The passengers are deposited and board not on the highway in front of the school but rather directly in front of the buildings in which they work, for the buses of Safeway Trails actually enter the school grounds in a manner exactly as requested by the witnesses.

By its petition for reconsideration by the entire Commission, Safeway Trails pointed to these facts and asked the Commission to reconsider the determination of its division 1 which found the existing service to the District Training School to be inadequate. Safeway argued that although the service may have been unsatisfactory at one time, nevertheless, it is not inadequate now and indeed is designed to satisfy the needs of the school as testified to by its employees. In its opinion on the petition for reconsideration the Commission stated

[29] The Trailways Terminal is located at 12th and New York Avenue, Northwest. The Railroad proposed to terminate its schedules at 16th and K Streets, Northwest, which is a considerable distance from the homes of these witnesses.

that it would restate the facts ". . . only to the extent necessary for a clear understanding of the issues." (J.S. 16a) Although the Commission thoroughly restated the Railroad's evidence as to the need for additional service to the District Training School, it failed to mention one word of the specially designed service of Safeway Trails. By its own admission, then, the Commission on reconsideration failed to consider the evidence of Safeway Trails in conjunction with that offered by the Railroad. The Commission failed to consider the evidence of Safeway Trails which so effectively detracted from the evidence of the Railroad, and in this failure the Commission acted in an unfair and unreasonable manner. As was held in *Universal Camera Corp.* v. *National Labor Relations Bd.*, 340 U.S. 474 (1950), the Court is precluded from sustaining an order merely on the basis of evidence which in and of itself justifies it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn. This, the District Court failed to do.

Safeway Trails contends that the Commission possesses no jurisdiction permitting the indiscriminate granting of operating rights to competing carriers over identical routes. Before the operation of an existing carrier may be permitted to be duplicated by another carrier, the Commission first must make an appropriate jurisdictional finding that the existing service fails through inability or otherwise to respond to the public needs and Universal Camera, *supra*, requires that such a finding be based on substantial evidence as defined therein. In the instant case the Commis-

sion failed to make such a jurisdictional finding as to Fort Meade, although specifically requested by Safeway Trails to consider and make a finding upon the conflicting evidence thereon. The finding as to inadequacy of existing service to the District Training School is not supported by substantial evidence. The action of Safeway Trails in enlarging its service to the school to satisfy an alleged increase in need, reflects its willingness and ability to adjust its service in accordance with public need and should not have been ignored by the Commission on reconsideration.

CONCLUSION

The record made before the Commission is very short and hearings were held which lasted only two days. But the issues which this Court is asked to resolve are very large and are of vital importance to Safeway Trails and to the industry generally. The terse and casual treatment accorded these issues by the motions to affirm reflect the lack of understanding and appreciation by counsel for the United States and the Commission as well as for the Railroad of their vital and substantial nature. The likelihood of success by Safeway Trails on this appeal is great.

The issues as to through routes and charter and special service are issues of first impression for this Court and for the federal courts generally. The issue as to the findings and evidence reflect the failure of the District Court to understand or correctly apply the well established rules thereon. Because of the substantiality of all the issues raised by this appeal, we

respectfully pray the motions to affirm be denied and ask that probable jurisdiction be noted.

Respectfully submitted,

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